IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS,
Plaintiff in Error,
vs.
STATE OF MISSOURI at the Information of JESSE W. BARRETT, Attorney-General,
Defendant in Error.

No. 252.

In Error to the Supreme Court of Missouri.

BRIEF FOR DEFENDANT IN ERROR ON REARGUMENT OF CASE.

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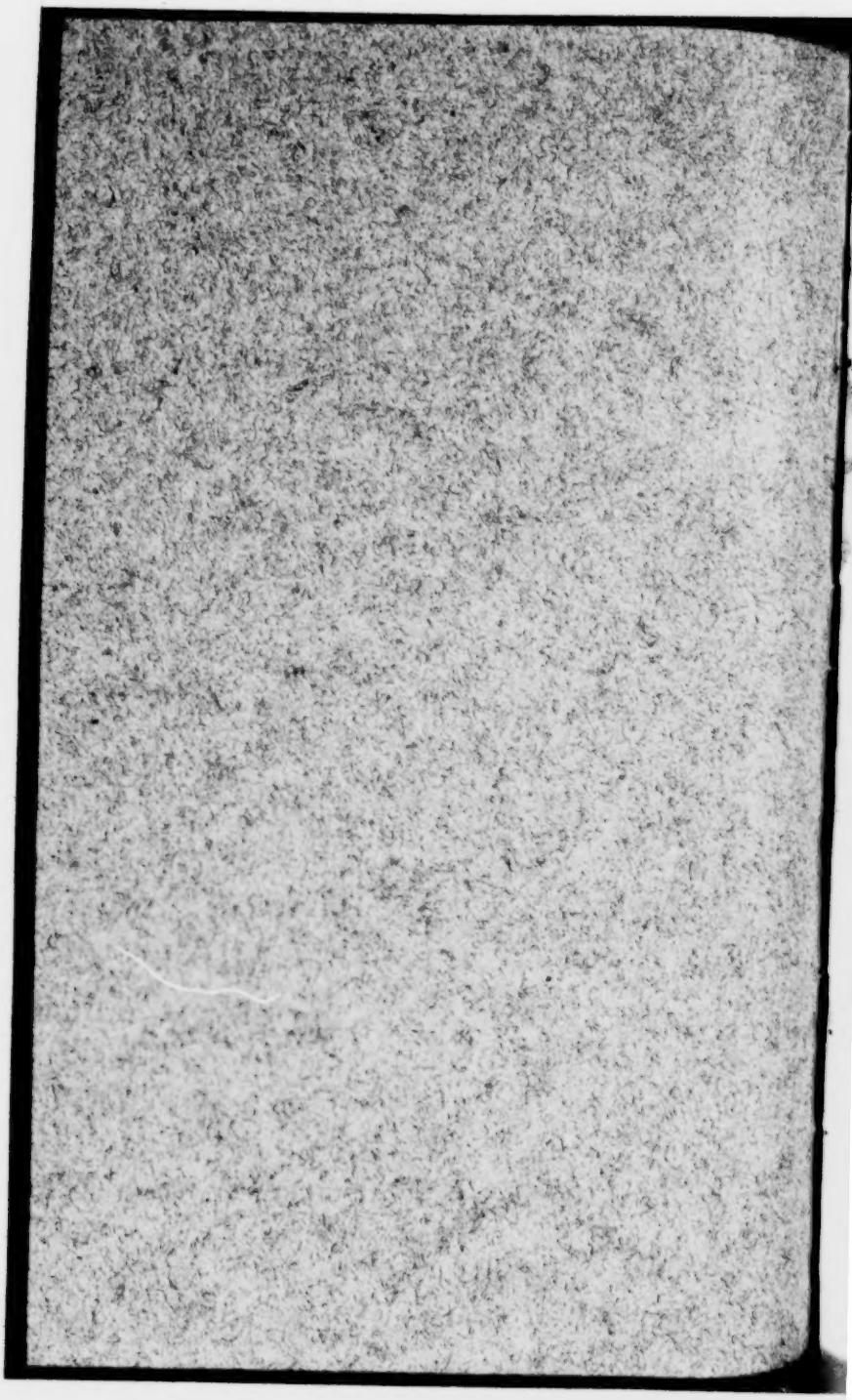

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This case was argued and submitted on May 7th, 1923, of the October, 1922, Term of this Court, following which the Court, on May 21st, 1923, made this order:

> "It is ordered that this case be restored to the docket for reargument at the next term, on the issue whether the State had authority to institute and maintain a proceeding to question compliance by a national bank with its charter."

The Court, on October 22nd, 1923, entered the following orders:

> "On consideration of the motion of the United States for leave to file a brief herein as amicus curiae, and to participate in the oral argument of this cause, it is now here ordered by this Court that the said motion be, and the same is, hereby granted.
>
> "On consideration of the motion of the plaintiff in error for modification of order, and to extend the scope of the reargument in this cause, it is now here ordered by this Court that the said motion be, and the same is, hereby granted; and that any further briefs on behalf of the plaintiff in error or of the United States shall be filed on or before November 1st, and briefs in reply thereto shall be filed on or before November 9th, next."

Our answer to the question propounded by the Court on May 21st, 1923, will cover the entire case.

THE ISSUE.

Has a State authority to institute and maintain a proceeding to question compliance by a national bank with its charter?

THE BANK'S ANSWER TO THE QUESTION.

The answer of the bank, it appears, is in effect that a national bank can in a state transgress the laws and authority of the Nation and the State to any extent it chooses, and that the State is powerless to question or stop such conduct. The Nation alone, the bank contends, can stop the transgression. And if the Nation does not stop it, the bank, without interference from the State, may continue its transgression of national and state laws.

THE STATE'S ANSWER TO THE QUESTION.

1. If the establishment and operation of branch banks by a national bank in a state is in excess of any authority from any source and if such unauthorized excesses contravene state law and policy and amount to a war of destruction upon the law-abiding banks of the state, the State (until the Nation draws the bank back in bounds) can at least question and stop such defiance of state law and order.

The Nation, of course, can also question and stop such conduct. The State has no authority to cut down any of the bank's authorized activities.

2. But if, on the contrary, the act of the national bank in the state is only an act in excess of, and thus only against, national authority, and is not in addi-

tion an act in contravention of local or state law, the State has no authority and claims no authority to question or stop such conduct. The Nation alone has such authority.

Thus the State of New York has no authority to question or stop the branch banking of national banks in New York City where state banks operate branches, if such conduct, though unauthorized by the Nation, does not transgress the policy or laws of the State of New York.

THE STATE'S PROPOSITION.

Branch banking by a national bank in Missouri as conduct in excess of any authority from the Nation, as conduct in contravention of Missouri law, and as conduct which amounts to unwarranted warfare upon competing Missouri state banks, is conduct either the Nation or Missouri has authority to question and stop.

The information filed by the State shows that the plaintiff in error is a national bank with an established banking house at Broadway and Locust streets in the City of St. Louis, Missouri; that it has established and is operating another, a branch bank, at another location in the city and intends to and will establish and operate other branch banks there unless prohibited; that it is not authorized to do this and is prohibited from so doing by the National Bank

Act, and that the establishment and operation of such branch banks is also opposed to the public law and policy of the State of Missouri and is to the great detriment of its banking interests and to its industrial and general business activities and welfare. The Supreme Court of Missouri was asked to end such conduct in the state.

The question is whether the State has authority to act.

There is no good reason why a national bank should be permitted, by the State, to exercise in the state powers which the national bank does not possess. No good reason is perceived why a State should not stop the unlawful operations in the state of a national bank when such operations are in excess of any authority, just as it may stop the unauthorized unlawful operations in the state of any other corporation. Especially is this true when the unauthorized operations of the national bank in the state are not only in contravention of state law but also amount as here to an effort to destroy the state banks.

The Court will understand that the purpose of the information filed in this case and the effect of the judgment of the Supreme Court of Missouri is not to deprive the bank of any right granted to it by the laws of the United States, nor to affect any of its legitimate operations in Missouri, nor is the information or judgment of the State Supreme Court in any

sense against the life of the bank nor any of its legitimate activities anywhere.

The information charges the bank with setting up and operating a branch bank, and with threatening to open and operate many more branches without warrant and regardless of the law. What the bank threatens to do amounts to a corporate usurpation and an illegal invasion of the rights of the State and of the Nation. Any such attempt, it would seem, may properly be restrained by the State.

If the State, in charging that the bank is without authority, has misunderstood or misconstrued the law; if national authority to establish branch banks does exist; if the federal statutes really do authorize branch banks—then the case of the State falls, and the State can have no relief.

But, if the bank has no authority from the Nation to engage in branch banking in Missouri, it cannot engage in branch banking by relying merely upon an unfounded claim of authority.

An unfounded claim of authority is not the equivalent of authority.

Counsel, however, apparently lose sight of this obvious fact that authority is one thing, while an unfounded claim of authority is an entirely different thing. The effect of authority is, of course, entirely different from the effect of an unfounded claim of authority.

The bank has no authority to engage in branch banking, but, because it claims such authority, it insists that the State must suffer from the bank's transgression without any relief, unless and until the Nation recognizes the plight of the State and stops the transgression of the bank. Unless and until the Nation acts, the unlawful excesses of the bank continue without any right in the State to end them.

In the case now under consideration the plaintiff in error is operating its bank at Broadway and Locust street in St. Louis, and is actually authorized to engage in the business of banking at that place. In contravention of Missouri law, and without authority from any source, but claiming authority from the Nation, the bank has opened and is operating another, a second, bank at 818 Olive street, in St. Louis, Missouri, and proposes opening and operating many other banks, branches or offices in St. Louis. It now contends that the State cannot prevent it from continuing to operate this other bank nor from establishing and operating any of the proposed additional banks, contending that the State has not the power to question or stop these excesses of national authority that are in addition in contravention of Missouri law—excesses that mean the destruction of all law-abiding banks in St. Louis.

As acts of agents of the State (**Osborn v. Bank**, 9 Wheat. 737, **Ex Parte Young**, 209 U. S. 123), and

as acts of agents of the Nation (**Wilson v. New**, 243 U. S. 332) can be questioned and stopped on the ground of lack of authority, it follows that the acts of a national bank as a national agency can likewise be questioned and stopped by the Nation if such acts are without authority. If, besides being acts in excess of any authority from the Nation, such conduct is violative of the law of the State in which committed and is injurious to the welfare of the State, such conduct can by the State be questioned and stopped as conduct in derogation of its sovereignty.

In short, the mere unfounded claim of a national bank that it has national authority to commit the act in the state is no shield for its misconduct as against the Nation nor as against the State.

It would appear that, the policy of the Nation and the State being the same, namely, against branch banking, the State in the situation here presented has the right and is in duty bound to take action to stop the lawless conduct, at least until the Nation acts. **United States v. Lanza**, 1922-1923 U. S. Sup. Ct. Adv. Ops., p. 169, the prohibition case; **Gilbert v. Minnesota**, 254 U. S. 325, the espionage law case; **Halter v. Nebraska**, 205 U. S. 34, the national flag case, and many other cases of this court recognize that the same act may be an offense against both sovereignties and that each may take action to question and stop such act.

It is inconceivable that a national agency, a national bank, can commit an act in one of the indestructible States of the indestructible Union in defiance of all law, and ruin competing state banks operating legitimately. If it can, and the State is helpless to stop such conduct, the State is quite the contrary of being indestructible. It is as of wax, and may itself be destroyed at any time by the exercise of ungranted powers at the instance of a national bank. Texas v. White, 7 Wall. 225, recognizes a State as on firmer footing.

In this republic, we believe, there yet remains a dual system of government—national and state; that each within its own domain is supreme, and that one of the chief functions of this Court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other (**Re Huff**, 197 U. S. 488).

It would seem from this general survey of the question that the State must, as a matter of self-preservation, necessarily have the right to question and stop an unlawful act in the state that is an act in excess of any authority under either sovereignty and against the welfare of the State until such time at least as the Nation acts to stop the national bank's usurpation.

We shall now proceed to consider in detail the elements of the State's proposition, taking up in order

the act of branch banking, first, as an act in excess of national authority; second, as an act in contravention of state law and policy; third, as an act amounting to unlawful warfare upon and destruction of Missouri state banks, and then, the conclusion that the State has authority to act.

I.

BRANCH BANKING BY A NATIONAL BANK IN A STATE IS CONDUCT IN EXCESS OF ANY AUTHORITY FROM THE NATION.

Under the National Bank Act a national bank can lawfully exercise only powers expressly granted and those necessarily incidental (Logan County Bank v. Townsend, 139 U. S. 67).

It is not claimed that there is statutory authority for branch banking.

The only contention made is that there exists in plaintiff in error an incidental power which confers upon plaintiff in error the right which it has asserted, to establish and maintain branch banks. Is such power of necessary implication?

Such power should not be implied, because the policy of branch banking contained in the first United States Bank Act, 1791-1811, and also contained in the second United States Bank Act, 1816-1836, was entirely discarded by the third or present National Bank Act, which went into effect in 1863-1864.

Centralization was the keynote of the first and second United States Bank Acts. Decentralization was the characteristic of the third or present National Bank Act.

The great argument in favor of the passage of the present act was that it would not in any measure tend to concentration of banking power.

Such was the spirit in which the National Bank Act was framed.

On March 3, 1865, there was enacted what is now known as U. S. R. S., Sec. 5155, Act March 3, 1865, c. 78, Sec. 7, 13 Stat. 484. The reason for the enactment is found in the Congressional Globe covering the second session of the Thirty-eighth Congress, 1864-1865, page 1125, at which page it appears that the bill was offered and was passed to a second reading. On March 3, 1865, pages 1281, 1282, of the above publication, it appears that Senator Van Winkle of West Virginia, the sponsor for the bill, gave the reason for this section by stating that there existed in his state, the Northwestern Bank at Wheeling, West Virginia, and that it had been by law required under the state law of West Virginia to establish a branch at Parkersburg, West Virginia, with a capital of $100,000; that this branch was established about 1845 and had continued in existence since; that the purpose of the bill was to permit that bank, required as

stated, to have such a branch, to come into the federal system and become a national bank.

On March 3, 1865, after this statement by Senator Van Winkle, the present section 5155, U. S. R. S. was enacted. It provides:

> "It shall be lawful for any bank or banking association organized under state laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank, and each branch, to be regulated by the amount of capital assigned to and used by each."

It will be noted in passing that this section, while it authorizes the conversion of a state bank with branches into a national bank with branches, does not authorize such bank when so converted to thereafter acquire or establish additional branches.

(Section 5155, United States Revised Statutes, as amended in 1913 by Section 8 of the Federal Reserve Act, limits this conversion right by providing that a state bank cannot be converted into a national bank if such conversion shall be in contravention of state law—1923 Instructions of Comptroller, p. 21.)

The next action taken by Congress with reference to branch banks was on May 12, 1892, when special authorization was given by law for the establishment and operation of a branch bank by a national bank in Jackson Park, Chicago, during the Chicago Exposition.

Next, similar special authority was, on March 3, 1901, given by Congress for a branch bank in Forest Park, St. Louis, Missouri, for the Louisiana Purchase Exposition.

Next, Congress, by Section 25 of the Federal Reserve Act of 1913, as amended by the acts of September 7, 1916, and September 17, 1919, gave the power to National Banks to have foreign branch banks. (See Comptroller's Instructions 1923, at page 115; Treasury Department Document No. 2920.)

Under this authorization for a foreign branch bank it is to be noted that by Section 25 of the Federal Reserve Act a national bank to operate a foreign branch bank:

(1) Must have a capital and surplus of $1,000,000.00 or over;

(2) Must apply for a permit and secure the approval of the Federal Reserve Board for the proposed foreign branch bank;

(3) Must operate the foreign branch bank on "such conditions and under such regulations as may be prescribed by the Federal Reserve Board";

(4) Must furnish information of the condition of the foreign branch on demand and "the Federal Reserve Board may order special examinations of said branches";

(5) Must have the accounts of each foreign branch bank conducted independent of the accounts of every other foreign branch bank and of its home office.

Foreign branch banks are, by law of Congress, authorized under these safeguards only. In view of the character of this legislation, and in view of the fact that there is no similar legislative authorization for domestic branch banks in the states, can it be questioned that congressional construction is that a national bank has no authority to engage in branch banking in any state?

Branch banking, if engaged in by a national bank in a state, is done without any of the safeguards thrown by law around foreign branch banking.

It may now be well to consider what the departmental construction has been and is.

In the 1923 Instructions of the Comptroller of the Treasury, Treasury Document No. 2920, at page 115, under the heading "Branch Banks," is found the Comptroller's printed construction, as follows:

"Chapter X.

Branch Banks.

124. Domestic branch banks.

"The only provision in the National Bank Act relating to branch banks is found in Section 5155, United States Revised Statutes, and reads as follows:

> "'It shall be lawful for any bank or banking association, organized under state laws and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws and to retain and keep in operation its branches, or such one or more of them as it may elect to retain. * * *'

"The granting of this special privilege to converting State Banks and the absence of any similar provision in the law with respect to domestic branches of National Banks of primary organization have always been construed by the Comptroller to imply that banks of the latter class were not permitted to have domestic branches. The section cited absolutely restricts branch banks of converted associations to such as have a definite proportion of the capital of the parent bank assigned to them, and it is not to be assumed that the law contemplated that associations of primary organization should be permitted to assign

any portion of their capital to and operate domestic branches.

"In a number of cases a State Bank having branches is converted into a National Bank under the provisions of this section, retaining its branches, and the National Bank has later been consolidated with another National Bank under the Act of November 7, 1918, the consolidated bank being permitted under law to retain and operate the branches."

The foregoing is the short form of statement adopted in 1923 in place of the much fuller form used by the Comptroller in 1905 instructions and all subsequent instructions up to 1923.

The 1920 instructions in effect in 1922, when plaintiff in error began its branch banking, are set forth in full in an appendix to our prior brief (pp. 126-130).

On May 11, 1911, Attorney-General Wickersham furnished the Secretary of the Treasury with an elaborate opinion reviewing the law and the departmental construction, and came to this conclusion (29 U. S. Atty. Gen., 81, 97):

"With this uniform construction of this statute by your department **for more than twenty years**, and the unmistakable inference that the Congress which passed the act entertained the same view as to its meaning, I would hesitate to

express a contrary opinion if, as an original proposition, I believed the act capable of being so construed, even though the contrary construction were the more reasonable.

"However, upon the various considerations above stated, it is my opinion that:

"First. Independently of Section 5190, Revised Statutes, a national bank is not, under its charter, authorized to establish a branch or coordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization; and,

"Second. That Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization."

It appears also from Mr. Wickersham's opinion (pp. 96-97) that the question had been passed upon August 10th, 1889, by Mr. Hepburn, then solicitor of the treasury, and again on November 15th, 1910, by the solicitor of the treasury of that time. Both these officials expressed the idea that **a national bank was restricted to one office or banking house in the place designated in the certificate of organization.**

The course of conduct of national banks relative to branches, the attitude of Congress relative thereto, and the rulings and attitude of the treasury depart-

ment have fixed a positive policy of limitation against branch banks in the United States since 1863. That policy has been recognized by this Court.

In **First National Bank v. Hawkins**, 174 U. S. 364, l. c. 369, the Court said:

> "Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that, in that way, the banking capital of a community might be concentrated in one concern, and business men deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking law, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing it. **The smaller banks, in such a case, would be, in fact, though not in form, branches of the larger one.**"

This case which involved the right of one national bank to own the stock of another national bank recognizes the intention of the law that each bank should be an independent institution and that this purpose would be defeated if one bank could hold the stock of another, making the bank whose stock was held in effect a branch of the other.

In First National Bank v. National Exchange Bank, 92 U. S. 122, the question of whether a national bank

had implied power to deal in stocks was involved, there being no federal law expressly granting such power. The Court said:

> **"Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant such power."**

Attorney-General Wickersham was clearly right in his conclusion that under federal law a national bank was not only not authorized but was also impliedly prohibited from engaging in branch banking.

In the 1922 supplement to Pratt's Digest of Federal Banking Laws, 1920 edition, which supplement contains all amendments and new rules and regulations to **November 1, 1922**, it is said (p. 7, sec. 7):

> "**Additional Offices of National Banks.**—Note to Sec. 109, page 100, Pratt's Digest 1920.
>
> "The Comptroller of the Currency is permitting national banks located in large cities in states where state banks or trust companies have offices, agencies or branch banks, to establish additional offices in the same city where their principal office is located. Each case will be considered on its merits and applicants should show conclusively competition of state institutions, with branches, and the need for additional offices in order to meet such competition.
>
> "A showing should be made also as to the necessity for an office in the locality where it is proposed to locate.

"The following quotation from a recent letter of Comptroller of the Currency Crissinger to Senator McCormick, sets forth the Comptroller's position in this matter:

> "'I am not authorizing the establishment of branch banks, but have been permitting national banks in states where state banks and trust companies have offices, agencies or branch banks to establish additional offices in some of the large cities where it is necessary to meet the competition of state banks that have literally taken possession of cities with branch banks or offices, and these facts are notorious and are well known to all state bankers of the country.'"

If the foregoing evidences, coeval with the present national bank system, do not show a uniform and consistent and settled departmental construction, it is difficult to conceive how a departmental construction is to be established.

Such was the status on October 2, 1923.

On October 3, 1923, Attorney-General Daugherty furnished an opinion to the Secretary of the Treasury, concluding as follows:

> "First: National banking associations have the power to open and operate offices at places other than their banking houses, within the place specified in their organization certificate, for the

performance of such routine services as the receipt of deposits and the cashing of checks for their customers.

"Second. National banking associations have no authority to open offices for the purpose of receiving deposits, paying checks, etc., outside of the limits of the city or place designated in the organization certificate as the place of its operations of discount and deposit."

The opinion of the Attorney-General is set out in full in the petition of plaintiff in error for modification of order on reargument. We respectfully submit that the first of the conclusions above set forth is not warranted by any of the cases cited. In McCormick v. Market National Bank, 165 U. S. 538, there was an attempted organization of a national bank. Before the association was authorized by the Comptroller to commence the business of banking it entered into a lease of premises to be used as its banking house. It never perfected its organization and threw up its lease. It was decided that the lease was void as in violation of the provision of the Banking Act that "No such association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking." The making of the lease was the transaction of business, and being pre-

maturely done, was void. The question here in dispute was in nowise involved in the case.

The opinion of the Attorney-General did not persuade the Comptroller of the Currency, for on the same day, in testifying before the Joint Committee of Congress on Membership in the Federal Reserve System he said:

> **"I am of the opinion that the Comptroller could not properly permit the establishment of these outside activities by a national bank such as teller's windows in any locality where the state laws or practices prohibit the state banks from rendering similar services."**

And ever since the opinion of the Attorney-General the uniform attitude of the Comptroller has been in accord with the ancient usage, to refuse permission for the establishment of branch banks or offices where branch banks were not allowed by the laws of the State.

The Attorney-General limits the authority which he finds for the operation of offices by a national bank at other than its banking house to "the performance of such routine services as the receipt of deposits and the cashing of checks for their customers," this being "the transaction of business of a routine character, which does not require the exercise of discretion." We cannot concur in this view. Routine business is

usual and regular business, and this can be and should be carried on at the regular place of business. And while routine, the conduct of this business does require discretion, both as to the taking in and the paying out of money. A bank has many more depositors than borrowers. Its borrowers, too, can usually take care of themselves. The depositors are in need of protection, and the law recognizes this and makes provision for it. The more places of deposit a bank has the more difficult will be the work of its examination.

Branch banking power should not be implied in the State of Missouri, because to do so is to imply that Congress intended to destroy Missouri state banks and nullify the Missouri policy as expressed in its statutes.

It is argued that national banks need this power to enable them to compete with state banks which possess it. As the law is being administered, banks in Missouri, state and national, are on an equal footing, neither having an advantage over the other. Implying such power in national banks in states where state banks do not possess it is to annihilate state banks, and no such power should be held to exist by implication.

As indicative of the attitude of the national government that national financial institutions cannot take an annihilative attitude toward state banking

institutions, this Court recently, in the case of **American Bank v. The Federal Reserve Bank,** 256 U. S. 350, held that a state bank in an injunction suit could enjoin the Federal Reserve Bank from what the Court characterized as unwarranted "warfare upon legitimate creations of the state."

In **First National Bank v. Fellows, Attorney-General ex rel.,** 244 U. S. 416, the case in which national banks were held to be authorized to engage in fiduciary activities in states where that was permitted to state banks and trust companies, the Court said (l. c. 425):

> "From this it must also follow that, even although a business be of such a character that it is not inherently considered susceptible of being included by Congress in the powers conferred on national banks, that rule would cease to apply if by state law state banking corporations, trust companies or others which by reason of their business are rivals or quasi-rivals of national banks are permitted to carry on such business. This must be, since the State may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course, as the general sub-

> ject of regulating the character of business just referred to is peculiarly within State administrative control, State regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers."

From this it appears that the authority of a national bank to engage in fiduciary activities must necessarily differ in different States. A national bank in one State will have certain fiduciary powers and in another State those powers may be either greater or less.

The Court thus recognized that state and national banks operate in the same competitive field.

Every consideration, including that of competition is against the implication of a power in a national bank to establish branch banks or offices in St. Louis, Missouri.

National banks of New York City have filed briefs in this cause as amici curiae. On that account, it becomes necessary to consider in this connection the situation of New York City national banks as contrasted with national banks in St. Louis, Missouri.

THE NEW YORK CITY SITUATION.

By Sectionss 51 and 110 of the Consolidated Laws of the State of New York, known as the Banking Law, New York permits a state bank in New York City to establish a branch bank, provided it applies for and receives from the State Superintendent of Banks an authority in the nature of a certificate of public necessity, approving the location at which the state bank seeks to engage in banking at its branch bank, and provided that there be a capitalization of $100,000 set aside for the branch bank. New York has in these sections to a considerable extent made the branch bank of the state bank an independent institution having its own capital. New York has thus approved for its state the policy that state banks in New York City may engage in branch banking under the limitations and the restrictions enumerated in its statutes.

The Comptroller of the Currency has allowed national banks in New York City to have branch banks to meet the competition of the state banks. The Comptroller of the Currency, prior to the month of October, 1923, had not authorized branch banking by national banks in New York City, but had "allowed" such branch banking there. The attitude of the Comptroller until October, 1923, was an attitude of tolerance. The brief filed herein by John A. Garver, Esq., as counsel for the National City Bank of New

York and the Chemical National Bank of New York, in effect, concedes that national authority does not exist for branch banking by national banks, for at page 20 of that brief he says:

> "The suggestion naturally occurs that if Congress intended that national banks should have the right to maintain a number of branch offices in a city for the more convenient transaction of the various kinds of business arising in different localities, it would be a simple matter to have the act amended by expressly conferring this power upon the banks. The conditions, however, are such that there is no hope of obtaining an amendment of this kind."

He then proceeds to show the reason why. The effort then of these two New York banks in this case is apparently to secure from this Court a construction authorizing branch banking by them in New York City that could not be obtained in the shape of a law from Congress.

To meet the New York City and other similar situations, there was introduced in Congress by Mr. McFadden (now Chairman of the Joint Committee on Inquiry of Membership in Federal Reserve System), in the Sixty-seventh Congress on May 16, 1920, a bill "To amend Sections 5155 and 5190 of the United States Revised Statutes, relating to branches of na-

tional banking associations, and for other purposes." That bill is as follows:

"**Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,** That sections 5155 and 5190 be, and hereby are, amended to read as follows:

" 'Sec. 5155. That it shall be lawful for any bank or banking association, organized under state laws and having branches, and converted into a national bank association as provided by Section 5154 of the United States Revised Statutes, to retain and keep in operation its branches or such one or more of them as it may elect to retain: **Provided,** That in addition to the amount of capital required by Section 5138 of the United States Revised Statutes, each such bank shall have a paid-in capital equal to at least 50 per centum of the capital required by section 5138, for the organization of a national bank at the location of the branch or branches, for each existing branch.

" 'Sec. 5190. The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate: **Provided,** That with the approval of the Comptroller of the Currency and of the Secretary of the Treasury, and when authorized by vote of shareholders owning not less than two-thirds of its capital stock, any national banking association may establish and maintain one or more branches in the same city, town or county in which the association is located: **Provided, further,** That the

capital of the association shall exceed by 50 per centum, for each branch so established and maintained, the capital required for the establishment of a national banking association as provided by Section 5138 of the Revised Statutes at the location of the branch or branches: **And provided further,** That in no case shall a national banking association establish or maintain more than twelve branches under the provisions of this act: **Provided, however,** That authority to establish branches shall only be granted to national banks located in states, the laws of which permit the operation of branches by state banking institutions.' "

Notwithstanding the McFadden bill was pending in Congress for nearly two years before the final adjournment of its last session, it failed to receive the approval of Congress.

This proposed legislation that has failed to be enacted, it will be noted, has reference only to a national bank engaged in a locality where state banks have, from the state, authority to engage in branch banking.

It has, of course, absolutely no reference to a state like Missouri where branch banking is prohibited by law.

The situation of national banks in New York City cannot be confused with the situation of the plaintiff in error in the City of St. Louis.

On October 26th, 1923, Comptroller Dawes, in view of the opinion rendered on October 3rd, 1923, by Attorney-General Daugherty, issued new branch bank regulations which, following the opinion of Attorney-General Daugherty, authorize offices for the "routine" business of receiving deposits and cashing checks in New York City.

This regulation is a construction that allows national banks on securing approval from the Comptroller to have branch offices for "routine" banking business. This new regulation does not authorize the establishment of any additional offices "in localities where the other banks are prohibited from enjoying similar privileges," so that plaintiff in error, under this regulation, could not secure from the Comptroller permission to operate branch banking offices for "routine" business in St. Louis, because the Missouri statutes prohibit state banks from having any such branch banking offices. The new October 26, 1923, regulations of Comptroller Dawes follow:

"Regulations of the Comptroller of the Currency Relating to Establishment of Additional Offices by National Banks.

"1. Under authority of the National Bank Act, as construed by the Attorney-General in opinions rendered May 11, 1911, and October 3, 1923, respectively, the Comptroller of the Currency will

permit national banks, under the conditions hereinafter set forth, to establish one or more additional offices.

"2. **A national bank will be permitted to establish such an office only in a city in which other banks are engaged in, and under existing law or regulation are permitted to engage de novo in, banking practices which make it necessary for the national bank in question to operate such an office in order effectively to conduct its banking business.**

"3. National banks will be permitted to establish such offices only within the limits of the city, town or village named in its organization certificate as the place where its operations of discount and deposit are to be carried on.

"4. A national bank desiring to establish and to operate one or more additional offices shall make application therefor to the Comptroller of the Currency on a form prescribed or approved by him in which shall be set forth, among other things, the following:

"(a) The number of offices and the proposed street location or vicinity of each.

"(b) A statement of the condition of the applying bank as of the date of application.

"(c) The number of banks with branches or additional offices in operation in said city.

"(d) A statement of the facts and conditions which, in the opinion of the board of directors, make it necessary for the applying bank to establish the proposed office or offices.

"5. Each application for one or more additional offices shall be accompanied by a certified

copy of a resolution of the board of directors showing that such application has been submitted to and approved by the board.

"6. After the Comptroller has approved the application of a national bank for one or more additional offices and before such office or offices are opened for business, a statement shall be transmitted to the Comptroller showing the street location, the purchase price paid, the annual rental cost, and the cost of equipment for each such office.

"7. Operations of additional offices of national banks established under these regulations shall be confined to the receipt of deposits and the payment of checks and other such routine or administrative functions.

"8. No investment in bonds or other securities for the account of the bank shall be made at any such additional office.

"9. No loan or discount shall be made to any customer of the bank through any such additional office that has not been authorized at the banking house by a resolution of the board of directors, or by an appropriate committee of such board, or by an officer or officers acting under authority from such board, and no general authority issued by the board of directors shall vest in any officer or employe at such additional office any discretionary authority with reference to making such loans or discounts.

"10. A statement of the business conducted at such offices shall be transmitted to the banking house as of the close of business daily, shall be

incorporated on the books at the banking house at regular intervals, and shall enter into all statements of the condition of the bank."

The Comptroller's letter of publication transmitting the regulation to the national banks of the country is as follows:

"Dear Sir:

"The Attorney-General in an opinion dated October 3, 1923, has made the following ruling:

> " 'A national banking association may establish in the city or place designated in its certificate of organization, an office or offices for the transaction of business of a routine character which does not require the exercise of discretion and which may be legally transacted by the bank itself. It may not, however, establish a branch bank doing a general banking business such as is usually done by national banks. The establishment of such a branch would be illegal and subject the offending bank to the forfeiture of its charter.'

"In this connection the Attorney-General further held that the manner of the exercise of the incidental powers, by virtue of which under the law, national banks are permitted to establish such offices, must be exercised 'subject to the supervision of the Comptroller of the Currency.'

"In the opinion rendered by Attorney-General Wickersham May 11, 1911, it was held that a

national bank is not authorized under the National Bank Act to establish a branch bank for the purpose of engaging in a general banking business: that the establishment of such a branch would be illegal and would subject the offending bank to the forfeiture of its charter.

"This view is confirmed and restated in the opinion of October 3rd, in which Attorney-General Daugherty elaborates the earlier opinion by making a distinction between the discretionary powers of a national bank (that is to say, the corporate powers of the bank as exercised by its board of directors) and the purely routine or administrative functions which may be performed by the bank employes. Upon this theory, while denying to a national bank the power to maintain a branch bank in which the discretionary authority of the board of directors could be exercised, he held that a national bank might establish an office or offices within the city or town in which the bank is located, at a distance from its banking house, and at or through such office or offices the bank might perform routine or administrative functions, leaving the discretionary authority of the bank to be exercised solely at the banking house.

"The right or power to establish such additional offices in the city or town in which the bank is located, not being expressly authorized by statute, but being an implied incidental power, and the functions to be performed through such offices, in the opinion of the Attorney-General, being limited to routine or administrative functions, it is necessary for the Comptroller of the Cur-

rency in the exercise of his general supervisory powers to prescribe regulations in which are set forth the conditions under which such offices may be established and operated.

"While the opinion of the Attorney-General permits the Comptroller of the Currency to afford a measure of relief to national banks in certain cities where local banking practices have put the national banks to a disadvantage, he could not properly permit such national banks to establish additional offices without restriction, or in localities where the other banks are prohibited from enjoying similar privileges. The establishment of such offices, being an exercise of an implied power, must be exercised only where an actual necessity exists in each instance and only after approval by the Comptroller of the Currency.

"Where a bank desires through such offices to exercise particular administrative functions not dealt with in existing regulations, an application should be made to the Comptroller of the Currency for a special ruling.

"With reference to applications to the Comptroller by national banks for permission to establish such an office or offices, the Comptroller will not take into consideration as a reason for his approval the fact that a bank has, prior to making such application, invested funds in property for the purpose of securing a site or sites therefor.

"The above-mentioned opinion of the Attorney-General and the regulations of the Comptroller of the Currency, to which reference is herein made, have no application to branches of national

banks acquired under the provisions of the Act of March 3, 1865, by virtue of which a state bank, having branches, may convert into a national bank and elect to retain its branches; nor to branches of national banks acquired as a result of the consolidation of national banks under the provisions of the Act of November 7, 1918, under which the branches of one or more of such consolidating banks, having been acquired under the Act of 1865, above referred to, may be retained by the national bank resulting from such consolidation.

"A copy of the regulations of the Comptroller of the Currency relating to the establishment of additional office, together with application to establish such office is enclosed.

Yours very truly,

Henry M. Dawes,
Comptroller of the Currency."

Branch banking as a general system for the country was the subject of controversy for many years, but the country definitely determined against it. Any authorization of branches under the present National Bank Act was to conserve existing rights or to meet peculiar situations. So far as the history of the subject goes there does not appear to have been prior to this case an assertion of right, by any national bank under the present system, to establish by force merely of its own volition more than one banking house or office, regardless of what the policy might be of the state in which it was located.

II.

BRANCH BANKING IS IN CONTRAVENTION OF MISSOURI LAW.

Branch banking by a national bank in Missouri, as conduct in excess of any authority granted by the nation, is conduct expressly prohibited by and is in contravention of the Missouri Banking Law.

> "Sec. 11684. **Prohibition of banking business.**— No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state **or of the United States, except as permitted by such laws,** shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a trans-Atlantic steamship company, or a telegraph or telephone company, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler's check, money order or otherwise (Laws 1915, p. 108)."

Revised Statutes of Missouri of 1919, Article I of Chapter 108.

Missouri thus prohibits acts by either national or state banks that are in excess of their authority.

Branch banking by a national bank in Missouri is in violation of the law of the state because without federal or state authority.

(See copy of opinion in this case of Walker, J., in Tr. of Rec., p. 1, 249 S. W. 619.)

The conduct of the branch banks, therefore, is in violation of the laws of Missouri, since it amounts to the conduct of a bank without either state or federal authority. It also violates the Missouri statute relating to branch banks, as held by the Supreme Court of Missouri in this case.

The policy of Missouri is against branch banking.

The section expressly prohibiting branch banking is as follows:

> "Sec. 11737. **Rights and powers.**—Every such corporation shall be authorized and empowered:
>
> "1. To conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon collateral or personal security at a rate of interest not exceeding that allowed by law, and also by buying, investing in, selling and discounting negotiable and non-negotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for

all loans and discounts made, such corporation may receive and retain in advance the interest; **provided, however, that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house.**"

Revised Statutes of Missouri of 1919, Article II of Chapter 108.

Missouri thus prohibits branch banking and the Supreme Court of the state has construed this to mean that a bank's banking business shall be conducted in one banking house, for it granted the relief prayed for by the State which was that:

"Respondent be ousted from the privilege of operating its said branch bank or any other branch banks and from conducting a banking business at any place or location other than one banking house or office maintained by it for such purposes."

III.

BRANCH BANKING BY NATIONAL BANKS IN MISSOURI IS UNWARRANTED WARFARE UPON THE STATE BANKS OF MISSOURI, OPPRESSIVE AND DESTRUCTIVE IN ITS CHARACTER.

Obviously to permit one system of banks to maintain and operate branch banks while this is denied to another system is to place that other system at a

great disadvantage. As a consequence in whatever states the state banks are possessed of this authority it is exercised by them, and the like authority is sought by the national banks. The adverse effect of the branch bank system where state banks are authorized to engage in it, is pointed out by former Comptroller Crissinger in his testimony before the McFadden Committee. He instances places like Atlanta, Detroit, San Francisco, Oakland, Los Angeles, New Orleans, Baltimore and Cleveland, where, under the operation of a state branch bank system, the national banks have diminished in number and importance, and it is to remove the inequality of such conditions that the McFadden bill is proposed, giving the national banks authority to operate branch banks in states wherein the state banks have it. If, as now contended, the federal statutes, as they stand, confer such authority, the enactment of the McFadden bill is unnecessary, and protection against the system is needed, not by the national banks, but by the state banks in states which deny the right to their own creatures. The result of such a construction will be that all the states must grant the authority to their own institutions or expose them to unequal and destructive competition, with the result that we will have a universal system of branch banking when very clearly nothing of the kind was intended by the National Bank Act. It is a fair as-

sumption that if Congress had intended to establish such a system, it would have declared its intention in plain and express terms and not have left it to an implication so obscure that half a century would pass before the power was asserted under the National Bank Act. But until now, whenever the pressure of the unequal competition became too great, the national banks changed to state banks, never thinking that they could get relief under federal law. How thoroughly grounded was the view that branch banking was not authorized by federal law is shown by the statement of Mr. Crissinger that "we have lost in the State of California, I suppose, forty big national banks in the last eighteen months." He testified further that the logical effect of the branch banking system was "to destroy the small independent banks and to have fewer of the banks."

Comptroller Dawes in his testimony before the same committee demonstrates by a showing of the results, in countries which have adopted the branch system, that the system is antagonistic to independent unit banks, because in its essence it is monopolistic. Wherever it is in vogue the number of banks is very limited, while the number of branches is very great. He believes that the branch system is a dangerous one, and not suited to our conditions. The rapid economic development of this country "has been largely due to the policy of the pioneering

unit banks." He makes clear that there was not lurking and inherent in our National Bank Act a principle by implication which is absolutely destructive of what for more than a half century was believed to be its manifest policy.

Whatever may be the remedy that should be applied in states which authorize branch banking, whether the power should be extended to national banks or withdrawn from state banks, in states like Missouri, where branch powers are denied to state banks, the solution is clear, the independent unit system should be maintained and there is no warrant for inference, implication or construction that the power to conduct their regular banking transactions, those of deposit or discount, could be extended beyond the one banking house of each national bank. As to this Comptroller Dawes expresses himself very distinctly:

> **"I am of the opinion that the Comptroller could not properly permit the establishment of these outside activities by a national bank, such as tellers' windows, in any locality where the state laws or practices prohibit the state banks from rendering similar services."**

Comptroller Dawes also points out the dangers in-

cident to a branch system and particularly as to safeguarding funds. He says:

"The examination of an institution with branches and subsidiaries is a very difficult one. The interdepartmental relationships vastly complicate it. It is more difficult to examine ten institutions of a given size which are associated in a branch banking system than it would be to examine ten independent institutions, as all of the transactions between the different branches have to be investigated and eliminations and adjustments made to produce a composite picture and prevent the improper manipulation of shifting of assets. This cannot be done satisfactorily without a simultaneous examination of parent bank and each one of the branches. This may be construed as an ex parte statement, but it bears the weight not alone of my individual opinion, but of the employes of the Comptroller's office who have been engaged in the examination of banks for many years. Bank examination involves very much more than a mere scrutiny of figures, questions of moral character, of local reputation, of valuations of securities, of conformity to local laws and rulings—these and many other elements enter into a proper examination. In the case of the examination of a very large bank, say with 75 to 100 branches, it would be impossible to mobilize a force of examiners of the ability to make an intelligent analysis of the situation in each individual community, even if it is to be assumed that the character of the banker is not a factor in the condition of the institution."

IV.

THE STATE HAS AUTHORITY TO ACT.

The State, when its action is not in conflict with national law, can suppress unauthorized, unlawful conduct of a national bank in the State.

A.

Acts of a National Bank in a State Which Are in Excess of Any Authority From the Nation and in Contravention of State Law Can Be Stopped by the State.

The Nation, of course, can also question and stop such conduct.

The State has no authority to cut down any of the bank's authorized activities.

In the case under consideration the act of the national bank in the State is an act in excess of any authority from the Nation and is in contravention of State law.

The branch banking of plaintiff in error in Missouri, as conduct in excess of any authority from the Nation, as conduct in contravention of Missouri law and as conduct amounting to unwarranted warfare upon competing Missouri state banks, is conduct either the Nation or Missouri can stop.

In First National Bank v. Fellows, Attorney-General, ex rel., 244 U. S. 416, it was held that the new power given by Congress to national banks to engage in fiduciary activities "when not in contravention of local or State law" was subject to regulation by the State, provided the State laws were not discriminatory. Mr. Chief Justice White in this connection said (l. c. 425):

> "Of course, as the general subject of regulating the character of business just referred to is peculiarly within State administrative control, State regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came, in virtue of authority conferred upon them by Congress, to exert such particular powers."

It is clear a State can and does control the fiduciary activities of a national bank in a State by State laws that are not discriminatory.

The laws of Missouri prohibiting banking excesses are not discriminatory, but apply equally to state and national banks. Why, then, may not the State stop the unauthorized unlawful branch banking of a national bank within its borders?

This Court said, in Bank v. Kentucky, 9 Wall. 353, that

> "National banks are subject to the laws of the state and are governed in their daily course of business far more by the laws of the state than of the nation."

In **McClellan v. Chipman,** 164 U. S. 347, the Massachusetts statute forbade preferences by transfers of property in cases of insolvency, while the National Bank Act authorized national banks to take mortgages and conveyances of real estate for previous debts. It was strenuously insisted on behalf of the national bank that the two laws were in conflict. The previous cases were carefully considered and those in which the state authority was upheld and those in which it was denied clearly distinguished.

The Court said (l. c. 356):

> "The only federal question for our consideration is whether there was conflict between the statutes of the United States and the provisions of the general law of the State of Massachusetts referred to and heretofore fully set out. Two propositions have been long since settled by the decisions of this Court:
>
> "**First. National banks 'are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their ac-**

quisition and transfer of property, their right to collect their debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the governmental that it becomes unconstitutional' (First Nat. Bank v. Kentucky, 76 U. S., 9 Wall. 362).

"Second. 'National banks are instrumentalities of the Federal Government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created' (Davis v. Elmira Sav. Bank, 161 U. S. 283).

"These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States."

We submit that the present case is within the rule and not within the exception, for the state law is in harmony with the federal law, and it cannot be said

that the state law impairs the efficiency of operation of the national bank when it does no more than prohibit what it has no right to do.

There is no conflict, in the case under consideration, between the statutes of the United States and the law and policy of Missouri.

As the opinion of the Supreme Court of Missouri in this case points out, the case of **First National Bank v. Commonwealth**, 143 Kentucky 816, 34 L. R. A. (N. S.) 54, 137 S. W. 518, is relevant. In that case the question involved was whether land not used by a national bank for its national banking business could be escheated under the Kentucky law, to the State of Kentucky.

The National Law, U. S. R. S. Section 5137, provided that a national bank should not hold land other than that used for its banking business beyond a period of five years. Similarly, the state law also provided that land not so used, held beyond such time, would be escheated to the state.

In this situation the State of Kentucky proceeded against a national bank in Kentucky to escheat land not used for banking purposes, held beyond the periods fixed in the national and state laws. The Court held that the land could be escheated to the state. Objection was made that the bank was an agency of the federal government; that Congress had

provided a complete system of control and regulation, and that the state had no authority to in any manner interfere with the affairs of national banks, and that state laws applicable to domestic and other corporations were wholly inoperative as to national banks, and that the state was without power to limit the quantity of real estate a national bank might own and hold. The following discussion of this question was had, and the Court states in conclusion (57 l. c.):

> "In other words, our opinion is that, while the state cannot, by either constitution or legislation, directly or indirectly, regulate or control the organization or conduct of national banks, so as to interfere with the legitimate business for which they were created, its laws applicable to banks and other corporations may be invoked against national banks when they attempt to exercise rights or do things outside the scope of the business they were created to carry on, and that are not essential to their existence or efficiency. **We think that when a national bank exceeds the purpose of its creation and goes beyond the scope of its functions as a national banking institution that the state may deal with such of its transactions as are in excess of the authority conferred by Congress and in violation of the laws of the state, as it would deal with the business or property of any other banking corporation.**"

The Court, in reaching this conclusion, discusses and relies on the cases of Davis v. Elmira Savings Bank, 161 U. S. 275; McClelland v. Chipman, 164 U. S. 347, and Bank v. Kentucky, 9 Wall. 356.

A state has under this Kentucky case, and should have, the right to question acts **in excess** of both national and state authority which are committed in the state.

It is urged that the case of **First National Bank of San Jose v. State of California**, U. S. Sup. Ct. Adv. Sh. 1922-23, p. 691, is authority to the contrary of the case of **First National Bank v. Kentucky**, supra. Instead of that being true, it appears that this court recognizes that a State cannot attempt to define the duties or control the conduct of a national bank **when such attempt conflicts with the laws of the United States or frustrates the purposes of the national legislation, or impairs the efficiency of the bank to discharge the duties for which it was created.**

In the California case, Mr. Justice McReynolds pointed out that the depositor deposited funds with the bank with the understanding that on demand from the depositor, the bank would repay. With this contract in existence the State of California passed a law to escheat funds in banks held for a period of over twenty years. The Court states:

> "Obviously, it attempts to qualify in an unusual way agreements between national banks

and their customers long understood to arise when the former received deposits **under their plainly granted power.**"

In the Kentucky case the bank **had no authority** under either state or national law to hold the land for more than five years, while in the California case the bank had the right to make and did make an agreement of deposit under which there was no period of time which would bar the right of the depositor to reclaim his deposit or bar the right of the bank to hold the deposit subject to demand.

In the Kentucky case, Kentucky acted in accord with national law and policy.

In the California case, California acted in conflict with national law and policy.

In this, the Missouri case, Missouri is acting in accord with national law and policy.

B.

An Unauthorized, Unlawful Act of a National Bank in a State Should Stand Upon the Same Footing as the Unauthorized Unlawful Act of Any Other Corporation.

It is clear Missouri has authority to question and to stop the unauthorized, unlawful act in Missouri of a Missouri corporation.

It is clear that Missouri has authority to question and stop the unauthorized, unlawful act in Missouri of a corporation of another State.

Standard Oil Co. v. Missouri ex rel., Hadley, 224 U. S. 270.

No reason is perceived why the act in the state of a national corporation, even though a national agency, which is in excess of any authority from the Nation and contravenes state law, should not be regarded in the same light as an unlawful and unauthorized act of a foreign corporation.

The State certainly has authority to act when as here the State acts not in conflict with any law or any policy of the Nation, but entirely and in full accord with its every purpose. Nation and State are here co-operating to achieve the same desirable end —a safe banking system of independent and competing units.

C.

A National Agency Is No More Free From Responsibility to the State for Unlawful Acts Done in the State Beyond the Scope of Its Powers and Authority Than Is a National Agent.

In Ex Parte Siebold, 100 U. S. 371, were involved the election laws of Maryland and of the United

States. Judges of election appointed under a statute of the State were convicted of violations of the federal statute, which made it a penal offense for officers of election, at an election held for a representative in Congress, to neglect to perform or to violate any duty in regard to such election whether required by a law of the State or of the United States. It was contended on behalf of the petitioners:

1. That the power to make regulations respecting the election of members of Congress granted to Congress by the Constitution was an exclusive power when exercised by Congress.

2. That this power when exercised must be so exercised as not to interfere or collide with regulations in that behalf made by the State, unless it provides for the complete control over the whole subject over which it is exercised.

3. That when put in operation by Congress, it must take the place of all State regulations of the subject regulated, which subject must be entirely and completely controlled and provided for by Congress.

The Court said:

> "We are unable to see why it necessarily follows that, if Congress makes **any** regulations on the subject, it must assume exclusive control of the **whole** subject. The Constitution does not **say so.**
>
> * * * * * * *

"Another objection made is, that if Congress can impose penalties for violation of State laws, the officer will be made liable to double punishment for delinquency—at the suit of the State and at the suit of the United States. But the answer to this is, that each government punishes for violation of duty to itself only. **Where a person owes a duty to two sovereigns, he is amenable to both for its performance, and either may call him to account.** Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act need not now be decided, although considerable discussion bearing upon the subject has taken place in this court tending to the conclusion that such a plea cannot be sustained.

* * * * * * *

"The true interest of the people of this country requires that both the National and State Governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other."

We submit as closely analogous to the instant case, that of **United States v. Lee**, 106 U. S. 196.

Lee was the owner of certain land in Virginia, which at the time of the suit, was held and occupied by the United States in part, as a national cemetery and in part as a military station, Kaufman, Strong and others being the officers and agents of the United States by whom the land was held. The title relied upon by the defendants was a tax-sale certificate made by Commissioners of the United States appointed under an act of Congress for the collection of direct taxes in the insurrectionary districts within the United States. If the sale underlying the certificate was a valid sale, the United States, which had bid in the land, had a good title to the land; while if the sale was not valid the title of the United States was void. Lee brought a suit in ejectment in the Circuit Court for the County of Alexandria, in the State of Virginia, in the form prescribed by the laws of that state. The case was at once removed by certiorari into the Circuit Court of the United States, where the trial was had before a jury, resulting in a verdict for the plaintiff, and from the judgment on that verdict the United States and Kaufman and his codefendants prosecuted writs of error on which the case was brought to this Court. The United States was not a party to the suit, but while defending the case by its proper officers in the court it declined, by its Attorney-General, to submit its rights to the jurisdiction of the court below, protesting that the

Court had no jurisdiction of the subject in controversy and moved that the declaration be set aside and all proceedings stayed and dismissed. The plaintiff demurred to his suggestion, and on hearing the demurrer was sustained. The defendants Kaufman and Strong pleaded the general issue. In the course of the trial the suggestion of the Attorney-General was again presented to the Court and again refused. It was found and determined in the case that the United States had acquired no title under the tax sale proceedings.

The great question in the case, however, was as to the right of the plaintiff to sue. The Court made this clear statement of the question:

> "The counsel for plaintiffs in error and in behalf of the United States assert the proposition that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the Court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses.
>
> "This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without

such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the Government."

The opinion, which is by Justice Miller, is a very elaborate one, and makes a comprehensive review of the authorities and finds in them no ground for denying jurisdiction in the case as against Kaufman and Strong, and passing from this review, he says:

"The position assumed here is that, however clear his rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

"But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

"In the case supposed, the Court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit and a cause of action cognizable in the court; a case within the

meaning of that term, as employed in the Constitution and defined by the decisions of this Court. It is to be presumed in favor of the jurisdiction of the Court that the plaintiff may be able to prove the right which he asserts in his declaration.

"What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff, a right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the Court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.

"It is not pretended, as the case now stands, that the President had any lawful authority to do this, nor that the legislative body could give him any such authority, except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who asserts authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty or property without due process of law, or to take private property without just compensation.

. . . . . .

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it."

Consider the facts of this case. The land in question was occupied by the United States, and it did assert title thereto. Kaufman and Strong were officers of the United States, and by direction of superior officers of the Government they assumed to hold this land. How then, could the suit be maintained by Lee? Because mere unfounded assertion of right and authority in the United States was not enough. If, upon examination, it was found, and there must be examination to make any finding, that the asserted right and authority did not exist, that the assertion of them was sheer usurpation and every act in exercise of them a trespass, then, despite their assertion, despite their appointment and commission, despite all directions of their superiors, as to this matter they were not officers of the United States nor in the exercise of any duties as such, and hence they were amenable as individuals to the law of the land.

To deny the right of the State to question and to put a stop to an act of the character here involved is

to make a national bank superior in power and dignity to the State in which it operates.

Threatened acts of a federal agent to carry into effect an unconstitutional law are subject to be enjoined:

Wilson v. New, 243 U. S. 332;
Hammer v. Dagenhart, 247 U. S. 251;
Kennington v. A. Mitchell Palmer, 255 U. S. 100;
Tedrow as U. S. District Attorney v. Lewis & Son Dry Goods Co., 255 U. S. 98;
State of Missouri v. Holland, U. S. Game Warden, 252 U. S. 416.

Similarly, agents of the State are subject to restraint.

Osborn v. United States Bank, 9 Wheat. 737;
Ex Parte Young, 209 U. S. 123.

The instant case presents no challenge as to the legality or constitutionality of any act of Congress, but simply asserts the usurpation of a right or privilege which has never been established or recognized by Congress or by the State of Missouri. The branch banking of the bank in the case under consideration has not even the color of an unconstitutional law to sustain it. It is wholly without authority.

How can it, therefore, be said that Missouri is helpless to stay the aggressions and usurpations of a national banking association doing business in Missouri, when the act complained of is nothing more than the usurpation of a right clearly withheld and not granted to it by any law?

D.

The Same Conduct May Be an Offense Against Both State and National Sovereignty and May Be Restrained by Both Nation and State.

In the case of Halter v. Nebraska, 205 U. S. 34, the State of Nebraska had passed legislation of the same character as that passed by the National Congress with reference to paying proper respect to the national flag. It was contended that as the Nation had the right to legislate with respect thereto, and had done so, the State had no right to act and any prosecution under its laws was unauthorized. This Court held that the effort of Nebraska, being in aid and in support of the National Government and in no way in conflict with its purposes, should be upheld.

In **Gilbert v. Minnesota,** 254 U. S. 325, the State enacted legislation in accord with the national legislation known as the Espionage Law, and prosecuted under its law for violation thereof. It was contended that, the United States having taken over the field of

such a vital thing as the army in war, that the State was precluded from legislating or acting judicially in that field.

The Supreme Court, however, through opinion by Mr. Justice McKenna, held that the state legislation of Minnesota must be upheld, as also the particular prosecution under it, for the reason that the aim of Minnesota was to act in support of and to carry out the purposes of the Nation.

In **United States v. Lanza,** U. S. Supreme Court Advance Opinions 1922-1923, p. 169, Lanza had been prosecuted under the State law for a given act that was at the same time an act that violated the national prohibition legislation. The claim was made on his behalf, when indicted under federal law for the same conduct, that he was being put in double jeopardy, in violation of the Fifth Amendment of the Constitution, because he had been prosecuted under the concurrent State law and could not, therefore, be again prosecuted under the concurrent federal law. On this ground the lower court dismissed five counts of the federal indictment against Lanza. This Court held that State conviction was not a bar to national prosecution and conviction for the same act.

There is in this case an elaborate review of the authorities from Fox v. Ohio, 5 How. 410, down, and

there is no room left for doubt that although the Nation outlaws an act or course of conduct, a State may do the same. And if this doctrine is carried so far that the result may be to subject a person to be twice punished for the same act, why should not either of the two sovereignties enjoin conduct which is a usurpation against each?

Supporting the full-crew law of Arkansas against the objection that it was an unauthorized regulation of interstate commerce, this Court (C. R. I. & Pa. Ry. Co. v. Arkansas, 219 U. S 453, l. c. 465) said:

> "It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the safety of all engaged in business or domiciled within its limits. Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the State. Local statutes directed to such an end have their source in the power of the State, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statute is not to be questioned in a federal court unless they are clearly inconsistent with some power granted to the General Government, or with some right secured by that instrument, or unless they are purely arbitrary in their nature."

Cases are cited on behalf of the bank in which the right of the State to act was denied, but in these cases there was a conflict between the State and Nation and, of course, the authority of the Nation was paramount.

In Ableman v. Booth, 21 How. 506, Booth was indicted, tried and convicted of a violation of the fugitive slave law in the United States District Court of Wisconsin. The Supreme Court of Wisconsin discharged him on writ of habeas corpus, holding that the fugitive slave law was unconstitutional and any conviction under it void. A writ of error being issued by this Court, the Supreme Court of Wisconsin at first refused obedience, but later made return to it. The State court in that case ignored the national law and national authority altogether, not only holding unconstitutional a federal law which this Court had held to be constitutional, but nullifying all the proceedings of a federal court of competent jurisdiction under it.

In re Tarble, 13 Wall. 397, young Tarble applied for enlistment in the Army of the United States, representing himself to be more than twenty-one years of age. He was enlisted in due form and sworn in the service. Later he deserted, but was captured and was being held for trial before a court-martial when his father sought his discharge on writ of habeas corpus issued by a state court, the father

alleging in his petition that the son was under the age of eighteen years at the time of his enlistment, which was not consented to by the father, and consequently the detention of the son was illegal. This Court decided that the state court was without jurisdiction to issue the writ, Tarble being claimed and held under color of authority of the United States by an officer of that Government. The exclusive jurisdiction of tribunals of the United States in such cases was held to be essential to the maintenance of the efficiency and integrity of the army organization, for the Court said:

> "It is manifest that the power of the National Government could not be exercised with energy and efficiency at all times if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty."

Tennessee v. Davis, 105 U. S. 257, was the case of a revenue officer of the United States indicted for murder in a state court. He applied under the Act of Congress for a removal of his case to the federal court. His petition, under oath, shows that he was a revenue officer, in the actual performance of his duty as such, when he was fired upon by a party of illicit distillers whose arrest he was undertaking, and in necessary defense of himself and in the discharge of his duty he returned the fire, killing one of the hos-

tile party. This was the act on account of which he had been indicted. This Court held that his petition made a case for removal under the Act of Congress, and that the act was valid.

In re Neagle, 135 U. S. 55, was the case of the man appointed to guard and protect Justice Field in the discharge of his judicial duties when he was threatened with violence and death by the Terrys, who were litigants before him. As was apprehended, an assault was made upon the Justice, and Neagle, in necessary defense of the Justice, shot Terry down. Mrs. Terry swore out a warrant against Neagle before a Justice of the Peace [illegible] a charge of murder, and Neagle was taken into custody. A writ of habeas corpus was issued by the United States District Court, and upon the hearing Neagle was discharged. This Court held, when the case came here, that it was a proper case for the writ as being the case of one "in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof." The Court said that (l. c. 59):

> "In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is 'a law' within the meaning of this phrase."

And what the Federal laws required him to do, the Federal tribunals would protect him in doing.

In Ohio v. Thomas, 173 U. S. 276, Thomas was the governor of a soldiers' home which was under the sole jurisdiction of Congress. The State had enacted a law that any person in charge of a hotel, restaurant, eating house, etc., etc., who therein sells, uses or serves oleomargarine shall display in the dining room a large placard announcing "oleomargarine sold and used here." And oleomargarine was not to be served as or for butter when butter was asked for. The Acts of Congress for carrying on the Soldiers' Home showed an appropriation by Congress for the specific purpose of purchasing "oleomargarine as part of the regular rations of the inmates of the home." The Court said (l. c. 284):

> "The act of the governor in serving it (oleomargarine) was **authorized** by Congress, and it was therefore legal, any act of the State to the contrary notwithstanding."

In these cases there existed a conflict between the State and Federal authorities. Contrary purposes were being attempted by them. Nothing of the sort obtains here. The conduct of which the State complains has not the sanction of Federal law, and per contra, the State and Federal law are in perfect har-

mony. Enforce the one and the purpose of the other is attained.

E.

A National Bank Is Subject to the Judicial Power of a State.

A case that deserves mention in this connection is that of **Guthrie v. Harkness,** 199 U. S. 148. In that case a stockholder sought inspection of the books of a national bank. The stockholder's attempt to examine the books was resisted on the ground that that was a matter involving the visitorial authority of the National Government, and that the stockholder for that reason could not have an inspection of the books. The courts of Utah, however, upheld the common-law right of the stockholder, and this opinion was affirmed by this Court in an opinion by Mr. Justice Day.

The Court said (l. c. 157):

> "But, it is said, the right of the shareholder to inspect the books is cut off by section 5241, providing 'no association shall be subject to any visitorial powers other than such as are authorized by this title, or **are vested in the courts of justice.**' "

The Court proceeds (l. c. 159):

> "The right of visitation being a public right, existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, Congress had in mind in passing this section that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and, authorizing the appointment of a receiver, to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. **Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.**
>
> **"That the statute did not intend in withholding visitorial powers to take away the right to proceed in courts of justice to enforce such recognized rights as are here involved is evident from the language used. If the right to compel the inspection of books was a well-recognized common-law remedy, as we have no doubt it was, even if included in visitorial powers as the terms are used in the statute, it would belong to that class 'vested in courts of justice' which are expressly excepted from the inhibition of the statute."**

From this conclusion it would appear that the State, in the proper exercise of its police power, has and ought to have the right to suppress an unlawful

act in the state that is wholly without authority from any source.

In **Hale v. Henkel**, 201 U. S. 43, a corporation of a state was charged by the United States with having violated the national Anti-Trust Law. In connection with that proceeding certain papers were sought, and it was urged that the corporation was a creation of a state, and that the only authority that had the right to examine the papers sought was the state creating the corporation, and that no such visitatorial power existed in the federal government. Mr. Justice Brown, in dealing with this matter of a state corporation acting in the national field of interstate commerce in violation of the national Anti-Trust Law, pointed out that the state corporation in such a case becomes subject to two sovereignties, and at page 75 said:

> "It is true that the corporation in this case was chartered under the laws of New Jersey, and that it received its franchise from the Legislature of that state, but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with due regard to its own laws. Being subject to this dual sovereignty,

> the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations."

Thus, it appears that though the national government is not the creator of a state corporation, it has, nevertheless, a right, in the nature of a special visitatorial power, as was held in the Hale case, over state corporations to the extent they enter the federal interstate field and violate the laws thereof.

The converse of the situation existing in the Hale case exists in the case at bar.

In the case at bar a bank is authorized to engage in national banking in the City of St. Louis, Missouri. As to all its authorized operations, the national government has unquestioned exclusive control, to the exclusion of any conflicting state action. The national bank, however, in the case at bar is not engaged in operations within the bounds of its authority, but its operations are activities outside the scope of its authority. Such outside operations are not, of course, national bank operations at all. The

nation, of course, has the right to suppress such outlaw operations.

Such outlaw operations, in the case at bar, happen to be operations, in addition, that are against the laws of the state and that amount to an unwarranted warfare against the welfare of the state and its banking system, and so the state is also interested to protect itself and its banking system from this unlawful aggression.

Missouri, in so acting, is acting in the sphere of its sovereignty, of its police power. To employ the reasoning of Mr. Justice Brown in the Hale case, a dual sovereignty exists when acts of a national bank that are non-national bank in character, and are wholly outside its authority, and are prohibited by the state, are committed in a state and are acts that are highly injurious to the interests of the state.

To paraphrase Mr. Justice Brown with respect to such outlaw acts in the state, "the power of the state in this particular, in the vindication of its own laws, is the same as if the corporation had been created by an act of the state."

The State has a right to enforce observance of the laws it has enacted to promote the welfare of the people. Individuals may suffer from the infraction of these laws, and a right of action may accrue to them therefor. But the State in such case may sue in its

own behalf, to enjoin the disregard of its laws, and to protect the interests of all its people.

In United States v. Am. Bell Telephone Co., 128 U. S. 315, it was decided that the United States as representing the general public interest in the subject matter had a right to maintain a suit in equity to annul a patent for an invention alleged to have been obtained by fraud.

In **Marshall Dental Company v. Iowa,** 226 U. S. 460, the State of Iowa sought to enjoin the defendants from draining the waters of a lake in Iowa. It was contended that the bed of the lake belonged to the United States. This was met by a contention that the bed of the lake belonged to the State. In this situation Mr. Justice Holmes said:

> "It is enough to say that by virtue of its sovereignty the State of Iowa has an interest in the condition of the lake sufficient to entitle it to maintain this suit against **an intruder without title,** whether the State owns the bed or not. This principle has been affirmed and acted on by the Court so recently that it does not require further argument here (**Georgia v. Tennessee Copper Co.,** 206 U. S. 230, 237; **Hudson Water Co. v. McCarter,** 209 U. S. 349, 356. See, also, **Kansas v. Colorado,** 206 U. S. 46, 93; **McGilvra v. Ross,** 215 U. S. 70, 79)."

The sixteenth subdivision of Section 24 of the Judicial Code confers original jurisdiction upon the

federal courts of all cases commenced by the United States or by direction of any officer thereof, against any national bank, of cases for winding up the affairs of any such bank, and of all suits brought by a national bank to enjoin the Comptroller of the Currency or any Receiver acting by his direction.

The present suit is not of any of the kinds mentioned.

The same section further provides that:

> "All national banking associations established under the laws of the United States, shall for the purpose of all other actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located."

The present suit is essentially one in equity and this provision of the law is broad enough in its scope to include it.

U. S. R. S., Section 5136, defining the powers of national banks, provides the power

> "to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons."

U. S. Comp. Stat. 1916, Sec. 9668, p. 11814, provides that excepting suits between national banks and the United States or its officers and agents the jurisdic-

tion in suits by or against such banks shall be the same and not other than, the jurisdiction against other banks doing business where the national banks are doing business when the suit may be begun.

This case is not within the exception of this law.

U. S. R. S., Section 5198, provides that:

> "Suits, actions and proceedings against any associations under this title, may be had in any circuit, district or territorial court of the United States within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The restriction of this last section as to place of suit is a matter of venue rather than of jurisdiction (Martin's Admr. v. B. & O. R. Co., 151 U. S. 673, 688). So far as subject matter is concerned, a very wide jurisdiction is granted.

These acts considered severally and altogether do not exclude the maintenance of the present suit by the State.

Reliance is placed on Section 5239, Revised Statutes, to defeat the authority of the State to act (Brief for the United States, pp. 19, 20, 21, 25, 47, 53, 54, 56). This section provides that a suit to forfeit the charter of a national banking association

shall be brought by the Comptroller in the proper court of the United States "if the directors" * * * "knowingly violate or knowingly permit" the employes of the association "to violate any of the provisions of this title," i. e., of the National Bank Act. And this section also provides that every director shall be liable for damages to all injured on account of such misconduct of the director.

Yates v. Jones Nat. Bank, 206 U. S. 158, is a careful study by Mr. Chief Justice White of section 5239. In that case it was held that under 5239 liability against a director only arose (and therefore ground for forfeiture of the bank's charter can only arise) when the director knowingly violates an "express" provision of the National Bank Act.

The Comptroller, under section 5239, therefore, could not sustain a charge that the directors knowingly violated an "express" provision of the National Bank Act by a showing that the bank engaged in branch banking. For branch banking is impliedly but not "expressly" prohibited by the National Bank Act by reason of the fact no express authority is given for it (92 U. S. 122) and we do not understand the Government or the plaintiff in error to make any contention branch banking is expressly prohibited by the act.

If the directors knowingly violate "express" prohibitions of the act the Comptroller appears, under

section 5239, to have the right to forfeit the charter. He has no authority thereunder to forfeit the charter when the conduct in question falls short of conduct **expressly** prohibited by the act as the conduct of branch banking does in this case.

Moreover, this suit of the State does not seek to forfeit the charter but merely to stop conduct in the state in excess of national authority that contravenes state law. The Comptroller could not sue for the violation by the bank of state law and policy any more than the State could sue to stop an act of the bank that was merely violative of federal law, and which did not in addition violate state law and policy. Section 5239 is not a bar against the State acting in this case.

In the case of **Herman v. Edwards**, 238 U. S. 107, this Court construed Subdivision 16 of Section 24 of the Judicial Code by holding that state courts are possessed of full jurisdiction of all cases of whatsoever character against national banks, except those cases specifically exempted therefrom by subdivision 16 of section 24.

It, therefore, appears that Congress has enacted laws by which its assent has been given, as construed by this Court, to the authority of the judiciary of a state to pass on practically all kinds of questions affecting national banks, except those specifically excepted in the statutes.

F.

Quo Warranto.

The case of **First National Bank v. Fellows ex rel. Union Trust Company**, 244 U. S. 416.

Under Section 11 (k) of the Federal Reserve Act of 1913, a national bank was given the power to engage in fiduciary activities "when not in contravention of State or local law," provided the bank secured a permit from the Federal Reserve Board.

Pursuant to this enactment of Congress, a national bank in Michigan applied for and secured from the Federal Reserve Board a permit to engage in fiduciary activities in the State of Michigan in connection with its national banking business.

The Attorney-General of the State of Michigan, by quo warranto, questioned such activities on the part of the national bank. The Supreme Court of Michigan held that Congress had no authority to grant a national bank the power to engage in fiduciary activities in any State, and that, therefore, the fiduciary activities of the Michigan national bank were without authority, the Federal act being unconstitutional.

On review in the Supreme Court of the United States, the first question dealt with was as to the authority of the State of Michigan to institute and maintain a proceeding of this sort. The right to

maintain such proceeding was upheld on two grounds: (1) that the congressional enactment had in it the provision "when not in contravention of State or local law," and (2) the Court said:

> "And our conclusion on this subject is fortified by the terms of Sec. 57, c. 106, 13 Stat. 116, making controversies concerning national banks cognizable in State courts because of their intimate relation to many State laws and regulations, although without the grant of the Act of Congress such controversies would have been Federal in character."

It will be noted that in this case there was authority from Congress, and that pursuant thereto a permit had been given to the bank, and that the action of the State was **in direct conflict** with an act of Congress and with a permit pursuant thereto given by the Federal Reserve Board.

In the case under consideration, in contrast, Congress has given no authority, expressly or impliedly, for the bank to engage in branch banking in the State of Missouri, and the bank has acted wholly without authority of any kind. The distinction, therefore, is that in the Michigan case there was congressional authority and a Federal Reserve Board permit, and yet this Court recognized the right of the State to question the authority of the bank, whereas in the case at bar the First National Bank has no au-

thority from any source to engage in branch banking in Missouri, and it is this conduct, without authority of any kind and in contravention of Missouri law, that the State has questioned and sought to stop.

We have pointed out heretofore that it is not the purpose of the proceeding and it is certainly not the effect of the judgment of the Supreme Court of Missouri to cut down in the slightest degree any exercise by the bank of its authorized powers or affect in the least any of its legitimate activities anywhere.

We have conceded, and there can be no question about the matter, that the only power that can take away from a national corporation authorized activities is the sovereignty that gave the authority in the first place to the corporation.

The Federal Government, alone, for the misconduct of a bank, can punish it by taking from it its authority to engage in legitimate authorized national bank activities. The State, we freely concede, has no such power.

The act of branch banking on the part of the bank is an act wholly without authority from the Nation, so that any stopping of branch banking is not a taking away of any of the authorized activities of the bank.

The branch banking of the bank is, in addition, an act against the laws and sovereignty of the State of Missouri and against its welfare, which, if per-

mitted to continue, will destroy the legitimate creations of the State.

With these two considerations in mind, there can be no question but that the remedy of quo warranto may be employed by the State to stop the usurpation against the State. Whatever may be said pro or con against the appropriateness of the remedy, that question is finally settled by the determination of the State Supreme Court that it is appropriate, provided only such remedy meets the requirements of due process of law.

The remedy of quo warranto is deemed in Missouri adapted to stop the unauthorized unlawful conduct in the State of a foreign corporation. That conclusion was questioned in this Court in the case of **Standard Oil Company against Missouri ex rel. Hadley**, 224 U. S. 270, in which it was contended that quo warranto was a writ, which it was asserted on the one hand was criminal in nature, and on the other hand, that it was civil. These contentions were all brushed aside by this Court in the following language, referring to the Supreme Court of Missouri:

> "Its decision and judgment necessarily imply that under that clause of the (Missouri) Constitution it had jurisdiction of the subject matter and authority to enter judgment of ouster and fine in civil quo warranto proceedings. That

> ruling is conclusive upon us, regardless of whether the judgment is civil or criminal, or both combined."

In other words, it is the view of this Court that the State of Missouri possesses the right to employ a remedy recognized by its courts as proper to redress the wrong committed.

In the **Standard Oil Company** case, supra, this Court also held, as to the quo warranto proceedings, that there was no denial of due process of law under the Fourteenth Amendment to the Constitution and that:

> "Due process requires that the Court which assumes to determine the rights of the parties shall have jurisdiction and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions which seem to be universally prescribed in all systems of law established by civilized countries, this Court has, up to this time, sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."

As quo warranto is the approved means to stop the unlawful act in the State of Missouri of a foreign corporation it would seem available for use to question and stop the unauthorized unlawful conduct of a national bank in the State.

IN CONCLUSION.

It is plain from the history of the National Bank Act that there was no purpose at any time to confer upon national banks generally the power to establish and operate branches in the cities in which they were respectively located. Where, by reason of peculiar circumstances, such branch banks were thought proper, express provision was made for them, as was also done in the case of foreign branches. These exceptional instances expressly provided for made stronger the implication against branch banks generally. If now branch banks are to become a regular feature of our banking system it should be only as a consequence of an express grant of such power made after due deliberation and consideration. And until such grant is made, national banks should not be permitted, by mere assertion and through the mere tolerance of an administrative officer of the United States, to put into practical effect a system of banking banned by the laws alike of the State and the Nation. What is sheer usurpation upon both these

sovereignties is, we submit, subject to repression at the suit of either of them.

Respectfully submitted,

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